GOLD BUTTE MINES, INC., ET AL.

IBLA 96-16 Decided June 5, 1998

Appeal from a decision of the Nevada State Office, Bureau of Land Management, declaring mining claims abandoned and void for failure to pay mining claim maintenance fees. NMC 594874, et al.

Affirmed as modified.

1. Mining Claims: Abandonment--Mining Claims: Rental or Claim Maintenance Fees: Generally

Where a mining claimant tenders payment of mining claim maintenance fees via a check that is later returned by the bank because of insufficient funds, the effect is the same as if the fees are not paid. The fees cannot be considered to have been timely tendered in the absence of an acknowledgment by a bank official that dishonor of the claimant's check was due to an error on the part of the bank.

APPEARANCES: Dion Frazier, President, Goldex Corporation, Pleasant Grove, Utah, for Appellant.

OPINION BY ADMINISTRATIVE JUDGE TERRY

Gold Butte Mines, Inc., et al. 1/ (Appellant) has appealed from a Decision of the Nevada State Office, Bureau of Land Management (BLM), dated August 11, 1995, declaring certain unpatented mining claims abandoned and void because Appellant failed to timely pay the maintenance fees for these claims, as required by section 10101 of the Omnibus Budget Reconciliation Act of 1993 (the Act), 30 U.S.C. § 28f (1994) and 43 C.F.R. §§ 3833.1-5, 3833.1-6, and 3833.1-7. Under the Act, a $100-per-claim maintenance fee was required to be filed for each claim on or before August 31, 1994, for the 1995 assessment year.

1/ Appellants include Gold Butte Mines, Inc., Bullion Monarch Company, and Goldex Corporation. The claims at issue were conveyed by Gold Butte Mines, Inc. and Bullion Monarch Company to Goldex Corporation on Aug. 3, 1995.

In its August 11, 1995, Decision, BLM declared 32 unpatented mining claims (NMC 594874, et al.) 2/ abandoned and void. In its Decision, BLM states that it received Appellant's check No. 106, in the amount of $3,200, dated August 31, 1994, on August 31, 1994, but that the check was returned by Bank of America on September 13, 1994, for insufficient funds. The BLM declared the claims abandoned and void because the maintenance fee was not timely received by August 31, 1994, as required by the Act and regulations. 3/

Appellant contends on appeal that the bank erred in dishonoring its check and that for this reason the claims should not have been declared abandoned and void. Appellant asserts that the check "was not honored as a result of an error by Bank of America, and that the payment should be deemed to have been made in accordance with 43 CFR 3833.1-3(a)." (Notice of Appeal, para. 2.) More specifically, in a September 25, 1995, letter to BLM appended to Appellant's Notice of Appeal, Dion Frazier, President of Goldex Corporation, states:

> 1. The check was issued on August 31, 1994 and there were insufficient funds in the account on that date.
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> 2. On September 6, 1994, Mr. Ron Frazier presented a deposit that the Bank did not accept. The check for deposit was from a brokerage house in Trust and the Bank erroneously did not realize Mr. Frazier was the Director of that Trust and had full authority to assign the check for deposit.
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> 3. On that date the check to the BLM was presented for payment and because of other account activity after August 31, 1994, there were insufficient funds without the deposit of September 6 in the account.
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> 4. The Bank mistakenly failed to inform Mr. Frazier that the account was in "over draft," denying him the opportunity to take any immediate curative action. Mr. Frazier was at the Bank on that day.

2/ The claims in question are denominated IU #1-IU #32 (NMC 594874-NMC 594905).

3/ For the purpose of complying with 43 C.F.R. § 3833.1-5 of this title, "timely filed" is defined as received within the time period prescribed by law, or, if mailed to the proper BLM office, contained within an envelope clearly postmarked by a bona fide mail delivery service within the period prescribed by law and received by the proper BLM State Office by 15 calendar days subsequent to such period, except as provided in § 1821.2-2(e) of this title if the last day falls on a day the office is closed. 43 C.F.R. § 3833.005(m). As check 106 was received by the Bank of America on Aug. 31, 1994, the 15-day grace period did not apply. However, no proper payment was made as the check was dishonored.

> 5. The deposit was cleared on September 8, 1994, and Mr. Frazier was still unaware at that time that the check to BLM had been returned.

Appellant also refers to 43 C.F.R. § 3833.1-3(a), which provides in pertinent part, that "[a] check or negotiable instrument * * * for which payment is not honored by the issuing authority, and such refusal is not an error of the issuing authority, will be deemed to be a nonpayment of the charges or fees for which the check or negotiable instrument * * * was tendered." Appellant contends the regulation is not applicable because the bank erred.

The record in this case does not support Appellant's assertions. The case record contains a copy of a September 20, 1995, letter to BLM from the Customer Service Manager, Fallon Office, Bank of America. The letter states:

> Mr. Frazier presented to the bank a deposit on 9/6/94 for $7500 from a brokerage firm, payable to a trust account, we couldn't credit his account with the check in that form, and it wasn't until 9/8/94 that the deposit was accepted in his account. In the meantime, the $3200 check was presented to the bank for payment on 9/6/94 and was returned on 9/7/94 unpaid.
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> Unfortunately, there were sufficient funds until 9/2/94 (Friday), and then after Labor Day on 9/6/94 & 9/7/94 there was not, but on 9/8/94 the large deposit was accepted and processed and sufficient funds have been in the account since then.

(Sept. 20 letter, paras. 2-3.)

Contrary to Appellant's arguments, the record does not show that check No. 106 was returned due to bank error. The September 20 letter from the bank's Customer Service Manager indicates that the Bank had been unable to credit the earlier deposit because it "couldn't credit his account with the check in that form." Appellant's assertion that the bank erred in not honoring the $7,500 deposit in the form it was presented, such that sufficient funds would have been present to cover check #106, is not supported by the record.

[1] In Elinor O'Rourke, 130 IBLA 87, 88-89 (1994), we observed that "[l]ongstanding Departmental precedent is clear that submission of a check that is not honored by the bank does not constitute payment." See also Great American Gold Co., 141 IBLA 170, 172 (1997; N.T.M., Inc., 128 IBLA 77, 80 (1993); Twin Arrow, Inc., 118 IBLA 55, 58 (1991). These Decisions are consistent with the regulation at 43 C.F.R. § 3833.1-3(a), referenced by Appellant, which is, in essence, a codification of that policy. Thus, in the absence of an acknowledgment of error by a bank official, the rule is that a check that is dishonored by the bank on which it is drawn does not constitute payment of the underlying obligation for which it is tendered. See Gary L. Carter (On Reconsideration), 132 IBLA 46, 47 (1995).

The BLM declared these claims abandoned and void. However, under 43 C.F.R. § 3833.4(a)(2), the failure to pay the maintenance fee or file the waiver certification within the time prescribed does not constitute an abandonment of the claims; instead, such a failure "shall be deemed conclusively to constitute a forfeiture" of the claims. See Great American Gold Co., supra, at 172. Accordingly, under the Act and implementing regulation, the claims in question are deemed forfeited.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is affirmed as modified.

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James P. Terry
Administrative Judge

I concur:

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John H. Kelly
Administrative Judge